

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

[illegible]

Docket No. 1,004,110

ORDER

The respondent and its insurance carrier appealed the December 2, 2003, Award entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on April 13, 2004.

APPEARANCES

William W. Hutton of Kansas City, Kansas, appeared for claimant. Nathan D. Burghart of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Respondent was an excavating company that was owned by claimant and his wife. On February 19, 2001, while driving from a work site to a shop that was shared by respondent and another company owned by claimant and his wife, claimant was injured in a truck accident. In the December 2, 2003, Award, Judge Howard held claimant's

accident arose out of and in the course of his employment with respondent. The Judge also found claimant provided respondent with timely written claim for workers compensation benefits.

Respondent and its insurance carrier contend Judge Howard erred as the accident did not arise out of and in the course of claimant's employment with respondent but, instead, the accident arose out of and in the course of claimant's employment with another company he owned, Builders Choice Foundation (Builders). In the alternative, respondent and its insurance carrier contend claimant failed to serve timely written claim for workers compensation benefits as he did not send the written claim to the insurance carrier. Consequently, respondent and its insurance carrier request the Board to deny claimant's request for benefits.

Conversely, claimant requests the Board to affirm the December 2, 2003, Award.

The only issues on this appeal are:

1. Did claimant's accident arise out of and in the course of employment with respondent?
2. Did claimant provide timely written claim?

The parties do not contest the Judge's finding that claimant sustained a 25 percent whole body functional impairment due to the February 2001 accident and the resulting neck injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

In February 2001, claimant and his wife owned and operated both respondent and another company, Builders Choice Foundation. Respondent was an excavating company. Builders constructed foundations and basements for houses. Claimant operated heavy equipment and performed physical labor for respondent. But the work claimant performed for Builders was primarily administrative.

On February 19, 2001, claimant drove a Builders truck to a housing subdivision in Platte County, Missouri, where Builders had a contract to construct two basements. After arriving at the subdivision, claimant and one of respondent's employees pumped water from an excavated basement site and performed other work on behalf of respondent to ready the site for the foundation work.

Claimant's testimony is uncontradicted that the contractor who was building the house in question had hired respondent to repair and ready the excavated site for the foundation work as a recent rainfall had caused dirt and mud to slide back into the hole.

After working for approximately an hour or so on the excavated site, claimant commenced his trip back to respondent's shop, which was also shared by Builders. Because of a concern about the clutch in one of Builders' trucks that was at the subdivision, claimant drove that truck for his trip back to the shop.

During claimant's trip to the shop, a car struck the truck claimant was driving. Claimant sustained serious injuries, which required neck surgery. And he now has a 25 percent whole body functional impairment.

The Board concludes the December 2, 2003, Award should be affirmed.

First, the Board agrees with Judge Howard that claimant was performing work for respondent at the job site before commencing his trip back to respondent's shop. Second, the Board finds that claimant's trip back to respondent's shop was incidental to the work that he performed for respondent and, therefore, claimant's accident arose out of and in the course of his employment with respondent. Third, respondent received timely written claim for workers compensation benefits when claimant filed his application for hearing with the Division of Workers Compensation in May 2002, which was well within 200 days of respondent and its insurance carrier last providing benefits to claimant in February 2002.¹ Respondent and its insurance carrier's argument that claimant was required to serve the insurance carrier with the written claim is without merit.²

AWARD

WHEREFORE, the Board affirms the December 2, 2003, Award entered by Judge Howard.

IT IS SO ORDERED.

¹ See K.S.A. 44-520a.

² See *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

Dated this ____ day of April 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William W. Hutton, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
James R. Hess³
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ Mr. Hess initially appeared in this proceeding for Continental Casualty, which is Builders Choice Foundation's insurance carrier. The Judge directed Mr. Hess to draft an order dismissing Continental Casualty from this claim. But the Board could not locate such an order.